Fernrite Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — TAX APPEAL NO R2-14-02 OF 2001
FAIZA TAMBY CHIK J
25 FEBRUARY 2002

Revenue Law — Income tax — Deduction — Commission paid by investment holding company on bank guarantee facility — Bank guarantee used to secure payment of purchase price of shares — Whether bank commission represented cost of acquiring assets — Whether bank commission used for production of dividend income — Whether bank commission allowable deduction under s 33(1) of Income Tax Act 1967

The appellant was an investment holding company incorporated in Malaysia and held shares and warrants in Pernas International Holdings Berhad ('PIHB'). The appellant acquired the PIHB shares and warrants from Perbadanan Nasional Bhd ('PNB') pursuant to a sale and purchase agreement ('SPA'). The appellant obtained a bank guarantee facility from a bank and, pursuant thereto, caused the bank to issue a bank guarantee in favour of PNB to secure the payment of the PIHB shares and warrants. The appellant paid bank commission every quarter at the rate of 1.2% per annum for the use of the bank guarantee facility. The titles in the PIHB shares and warrants were transferred to the appellant upon the issuance of the bank guarantee and the appellant received dividends from then on.

The Special Commissioners of Income Tax ('the Commissioners') made a finding, inter alia, that the bank commission paid by the appellant represented the cost of acquiring those assets and hence,was not an allowable deduction under s 33(1) of the Income Tax Act 1967 ('the Act') and that the appellant's income by way of dividend was assessable under s 4(c) of the Act. This was an appeal by way of a case stated from the order of the Commissioners. The central issue to be determined here was whether bank commissions incurred and paid by the appellant for the use of a bank guarantee facility were wholly and exclusively incurred in the production of the appellant's dividend income within the meaning of s 33 of the Act.

The grounds of appeal were that: (a) the Commissioners had misdirected themselves in finding that the bank guarantee was a 'precondition' for the purchase of the PIHB shares and warrants; (b) the Commissioners had erred in law when they made a finding that the purpose of the bank guarantee facility was to enable the appellant to acquire the PIHB shares and warrants (which constituted the capital assets of the appellant) and that the bank commission paid by the appellant represented the cost of acquiring those assets; and (c) the Commissioners erred in law when they rejected the appellant's argument that it carried on the business of an investment holding company and its business income was the dividends received from the shares.

Held, allowing the appeal:

(1) The Commissioners' finding that the bank guarantee was a precondition for the purchase of the PIHB shares and warrants was not

a fact proven but an inference. There was no document to prove that the bank guarantee was a precondition for the purchase price of the PIHB shares and warrants. Under the SPA, one of the documents to be delivered to PNB on the completion date was the bank guarantee. Further, the bank guarantee was not included in the list of the conditions precedent stipulated in the SPA. This misdirection in regard to the requirement of the bank guarantee being a precondition was a material misdirection and led the Commissioners to hold that the bank commissions paid were capital in nature (see paras 5 and 11).

(2) The Commissioners' findings that the purpose of the bank guarantee facility was to enable the appellant to acquire the PIHB shares and warrants and that the bank commissions paid by the appellant represented the cost of acquiring those assets contradicted the agreed facts, which clearly stated that the bank commissions were in consideration of the bank guarantee facility and for the use of the bank guarantee facility. The Commissioners had no authority to go behind the statement of agreed facts and it was not open to them to say that the bank commissions represented the cost of acquiring the PIHB shares and warrants. The bank commissions did not form part of the purchase price and as such, were not capital (see paras 18, 19, 20, and 26).

(3) The Commissioners had misconceived the appellant's argument that the bank commission fees paid were akin to 'interest'. It was not that bank commission fees were the same as interest (which was allowable under s 33(1)(a) of the Act) but rather, that the bank commission fees were analogous to interest payments on loans and should be considered as falling under revenue expenditure under s 33(1) of the Act. There were cases to show that a bank guarantee was analogous to a loan and it followed that 'interest' paid on loans was analogous to bank commissions paid on a guarantee and therefore, fell under a 'revenue expense' (see paras 26 and 28).

(4) It was an agreed fact that the appellant carried on the business of an investment company from which dividends were derived. The bank commissions, like interest on a loan, were a cost of producing the dividends and hence revenue in nature. If the bank commissions for the bank guarantee were analogous to interest on a loan, then it followed that such bank commissions were allowable deductions. The test to be applied was whether the payments created any assets. In the instant case, the payment of the bank commission did not create any assets (see paras 30, 36, 37 and 41); *ML & Ors v Ketua Pengarah Hasil Dalam Negeri* followed.

(5) The Commissioners totally ignored an important fact, namely, that the appellant had paid an 'arrangement fee' of RM2,478,561 in respect of the bank guarantee. This was different from the bank commissions, which were payable annually and thus recurring, the 'arrangement fee' was paid once and for all. The appellant did not dispute that 'arrangement fees' were capital since it was preparatory to the bank guarantee. The Commissioners did not distinguish between the 'arrangement fee' and 'the bank commissions' (see paras 40 and 70).

(6) It was an agreed fact that the bank commissions were payable in consideration of the banking service. Since the Commissioners cannot go behind a statement of agreed facts, it was not open to the Commissioners to hold that the bank commissions formed part of the cost of the shares (see para 40).

(7) It was also an agreed fact that the appellant carried on the business of an investment holding company. As such, the Commissioners' conclusion that the dividend income was to be taxed under the non-business provision of s 4(c) of the Act was an error of law (see para 64).

[Bahasa Malaysia summary

Perayu merupakan satu syarikat pelaburan yang ditubuhkan di Malaysia dan memegang saham dan waran di Pernas International Holdings Bhd ('PIHB'). Perayu telah mendapat saham dan waran PIHB daripada Perbadanan Nasional Bhd ('PNB') melalui satu perjanjian jual beli ('SPA'). Perayu telah mendapat kemudahan jaminan bank daripada sebuah bank, dan dari kemudahan jaminan tersebut, menyebabkan bank tersebut mengeluarkankan jaminan bank untuk PNB untuk menjamin pembayaran saham dan waran PIHB. Perayu telah membayar komisen setiap suku pada kadar 1.2% setahun untuk menggunakan kemudahan jaminan bank tersebut. Hak milik dalam saham dan waran PIHB telah dipindah kepada perayu setelah bank mengeluarkan jaminan bank tersebut dan perayu menerima dividen seterusnya.

Pesuruhjaya Jabatan Hasil Dalam Negeri ('Pesuruhjaya') telah mendapat tahu, iaitu, komisen bank yang dibayar oleh perayu mewakili kos-kos untuk mendapatkan aset tersebut, oleh itu bukanlah potongan yang dibenarkan di bawah s 33(1) Akta Cukai Pendapatan 1967 ('Akta tersebut') dan pendapatan perayu secara dividen boleh ditaksirkan di bawah s 4(c) Akta tersebut. Ini adalah rayuan melalui satu kes daripada perintah Pesuruhjaya. Isu utama yang perlu ditentukan di sini adalah sama ada komisen bank tersebut yang dikenakan dan dibayar oleh perayu untuk menggunakan kemudahan jaminan bank adalah secara keseluruhan dan eksklusif dikenakan di dalam penerbitan pendapatan dividen perayu seperti di bawah s 33 Akta tersebut.

Alasan-alasan rayuan adalah: (a) Pesuruhjaya telah terkhilaf di dalam penemuan mereka bahawa jaminan bank merupakan 'precondition' untuk pembelian saham dan waran PIHB; (b) Pesuruhjaya telah salah dari segi undang -undang apabila mereka mendapat tahu bahawa tujuan jaminan bank adalah untuk perayu memperoleh saham dan waran PINB (yang merupakan aset kapital perayu) dan komisen bank yang dibayar kepada bank tersebut oleh perayu yang mewakili kos untuk mendapatkan aset-aset tersebut; dan (c) Pesuruhjaya telah terkhilaf undang-undang apabila menolak hujahan perayu bahawa syarikatnya menjalankan perniagaan pelaburan dan pendapatan perniagaannya adalah dividen yang diterima saham tersebut.

Diputuskan, permohonan dibenarkan:

(1) Penemuan Pesuruhjaya bahawa jaminan bank merupakan pra syarat untuk pembelian saham dan waran PIHB ini bukan satu fakta yang dibuktikan tetapi inferens. Tidak ada sebarang dokumen untuk

membuktikan bahawa jaminan bank itu adalah pra syarat untuk harga pembelian saham dan waran PIHB. Di bawah SPA, salah satu dokumen yang diberikan kepada PNB semasa tarikh penyelesaian ini adalah jaminan bank tersebut. Seterusnya, jaminan bank ini juga tidak ada di dalam senarai dokumen yang ditetapkan dalam SPA. Kekhilafan yang dibuat dalam mendapatkan jaminan bank sebagai pra syarat adalah kekhilafan material dan menyebabkan Pesuruhjaya memegang komisen bank adalah bersifat pendapatan (lihat perenggan 5 dan 11).

(2) Penemuan Pesuruhjaya bahawa tujuan kemudahan jaminan bank adalah untuk membolehkan perayu mendapat saham dan waran PIHB dan komisen bank yang dibayar perayu mewakili kos untuk memperoleh aset tersebut bercanggah dengan fakta-fakta yang dipersetujui, yang jelas menunjukkan bahawa komisen ini adalah sebagai jaminan bank dan penggunaan kemudahan jaminan bank. Pesuruhjaya tidak berkuasa untuk mencari maksud tersirat dalam fakta yang dipersetujui dan mereka tidak boleh menyatakan bahawa komisen bank mewakili kos memperoleh saham dan waran PIHB. Komisen bank yang tidak merangkumi sebahagian dari harga pembelian, oleh itu bukan merupakan pendapatan (lihat perenggan 20 dan 26).

(3) Pesuruhjaya telah tersalah tafsir hujah perayu bahawa fi untuk komisen bank yang dibayar adalah sama dengan 'faedah' (yang dibenarkan di bawah s 33(1)(a) Akta tersebut), malahan, fi untuk komisen bank ada persamaannya dengan bayaran faedah atas pinjaman dan patut ditetapkan sebagai jatuh di bawah kategori hasil perbelanjaan di bawah s 33(1)(a) Akta tersebut. Terdapat kes-kes yang menunjukkan bahawa jaminan bank ada persamaannya dengan komisen bank yang dibayar atas jaminan dan merupakan 'hasil perbelanjaan' (lihat perenggan 26 dan 28).

(4) Adalah fakta yang dipersetujui bahawa perayu menjalankan perniagaan syarikat pelaburan dan memperoleh dividen. Komisen bank, seperti faedah atas pinjaman, merupakan kos untuk memperoleh dividen, dan komisen bank tersebut merupakan pengurangan yang dibenarkan. Jika komisen untuk jaminan bank ada persamaannya dengan faedah pinjaman, komisen bank tersebut merupakan pengurangan yang dibenarkan. Ujian yang dikenakan di sini adalah sama ada pembayaran tersebut mewujudkan aset. Dalam kes ini, pembayaran komisen bank tidak mewujudkan apa-apa aset (lihat perenggan 30, 36, 37 dan 41); *ML & Ors v Ketua Pengarah Hasil Dalam Negeri* diikut.

(5) Pesuruhjaya telah melupakan satu fakta yang penting, iaitu, perayu telah membayar 'arrangement fee' yang berjumlah RM2,478,561 sebagai jaminan bank. Ini berbeza dari komisen bank, yang dibayar secara tahunan, 'arangement fee' hanya dibayar sekali sahaja. Perayu tidak mencabar bahawa 'arrangement fee' adalah pendapatan dan adalah persediaan untuk mendapatkan jaminan bank. Pesuruhjaya tidak membezakan di antara 'arrangement fee' dan 'the bank commissions' (lihat perenggan 40 dan 70).

(6) Adalah fakta yang dipersetujui bahawa komisen bank boleh dibayar kerana perkhidmatan bank. Oleh kerana Pesuruhjaya tidak dapat meneliti maksud tersirat fakta-fakta yang dipersetujui, Pesuruhjaya tidak boleh memutuskan bahawa komisen yang dibayar kepada bank sebagai kos saham tersebut (lihat perenggan 40).

(7) Adalah juga fakta yang dipersetujui bahawa perayu telah menjalankan perniagaan syarikat pelaburan. Oleh itu, kesimpulan Pesuruhjaya bahawa pendapatan dividen adalah dikenakan cukai di bawah peruntukan bukan perniagaan s 4(c) Akta adalah satu kesalahan undang-undang (lihat perenggan 64).]

Notes

For cases on deduction of income tax, see 10 Mallal's Digest (4th Ed, 2002 Reissue) paras 2168-2207.

Cases referred to

American Leaf Blending v Director General of Inland Revenue Co Sdn Bhd [1979] 1 MLJ 1 (refd)
Ben Odeco Ltd v Powlson [1978] 2 All ER 111 (refd)
Bombay Steam Navigation Pte Ltd v Commissioners of Income Tax Bombay (1965) 56 ITR 52 (refd)
Chua Lip Kong v Director General of Inland Revenue [1982] 1 MLJ 235 (refd)
Director General of Inland Revenue v Rakyat Berjaya Sdn Bhd [1984] 1 MLJ 248 (refd)
Edwards v Bairstow & Harrison 36 TC 207, [1956] AC 14 (refd)
FCD v Director General [1992] 2 MSTC 2181 (refd)
Garforth v Tankand Carpets Ltd [1980] STC 251 (refd)
Heather v PE Consulting Group Ltd 48 TC 293 (refd)
Hoechst Finance Ltd v Gumbrell [1981] STC 127 (refd)
Hudson's Bay Company v Thew 7 TC 206 (refd)
Jenning v Barfield 40 TC 365 (refd)
Ketua Pengarah Hasil Dalam Negeri v FCD (unpreported, Case No Rl-14-3-1993) (refd)
Ketua Pengarah LHDN v Dr Arunjit Dutt [1995] 2 MSTC 3454 (refd)
Lunt v Wellesley 27 TC 78 (refd)
Mamor Sdn Bhd v Director General of Inland Revenue [1981] 1 MLJ 117 (refd)
Meadowcroft v Commissioner of Inland Revenue [1964] NZCR 108 (refd)
Mitchell v BW Noble Ltd 11 IC 372 (refd)
ML & Ors v Ketua Pengarah Hasil Dalam Negeri [2000] MSTC 3804 (folld)
Murgatroyd (Inspector of Taxes) v Evens-Jackson [1967] 43 TC 581 (refd)
Prendengast v Cameron [1940] 23 TC 122 (refd)
Rangatira Ltd v Commissioners of Inland Revenue [1997] STC 47 (refd)
Seabanc Kredit Sdn Bhd [1998] MSTC 3695 (refd)
Scoble & Ors v Secretary of State in Council for India 4 TC 478 (refd)
Southern v Borax Consolidated Ltd [1941] 23 TC 597 (refd)
Taxes Land & Mortgage Company v Holtham [1894] 3 TC 255 (refd)
Ure v Federal Commissioners of Taxation (SC) 80 ATC 4264 (refd)
Vallambrosa Rubber Co Ltd v Farmer 5 TC 529 (refd)

Legislation referred to

Income Tax Act 1967 s 33
Income Tax Assessment Act 1936-1976 (Aust) ss 51, 67(1)
Tax Act 1970 (UK) s 304

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Faiza Tamby Chik J

[1] This is an appeal by way of a Case Stated from the Deciding Order dated 2 February 2001 of The Special Commissioners of Income Tax. The years of assessment are 1997 dated 11 September 1998 and 1998, dated 28 December 1999. The central issue is whether payments, that is, bank commissions, incurred and paid by the Appellant for the use of a bank guarantee facility are wholly and exclusively incurred in the production of gross income, namely dividend income of the Appellant, within the meaning of s 33 of the Income Tax Act 1967 ('th Act').

[2] The facts admitted are set out at pp 3–7 of the Case Stated and are repeated here as follows:

(1) The Appellant, Fernrite Sdn Bhd, is a company incorporated in Malaysia with its registered office at the 14th Floor, Menara Tun Razak Jalan Raja Laut, PO Box 10493, 50714 Kuala Lumpur; and it carries on the business of an investment holding company.

(2) Perbadanan Nasional Berhad ('PNS') is a company incorporated in Malaysia with its registered office at Level 9B, Menara Dato' Onn, Putra World Trade Centre, No 45 Jalan Tun Ismail, 50480 Kuala Lumpur.

(3) The Government of Malaysia (through the Minister of Finance Incorporated) is the legal and beneficial owner of the issued and paid up shares of PNS.

(4) In furtherance of a privatisation exercise which has received the approval and consent of the Government of Malaysia, PNS by a Sale and Purchase Agreement dated 19 August 1996, agreed to sell to the Appellant One Hundred and Ninety Nine Million, Three Hundred and One Thousand, Six Hundred and Sixteen (199,301,616) shares in Pernas International Hotels and Properties Berhad now known as Pernas International Holdings Berhad, a public listed company incorporated in Malaysia and having its registered office at 14th Floor to 16th Floor, Menara Tun Razak, Jalan Raja Laut 50350 Kuala Lumpur, defined in the said Sale and Purchase Agreement as 'Sale Shares'; and also agreed to sell to the Appellant, Twenty Eight Million, Four Hundred and Seventy One Thousand, Six Hundred and Fifty Nine (28,471,659) warrants belonging to PNS, defined in the said Sale and Purchase Agreement as 'Sale Warrants'.

(5) The Appellant agreed to purchase the said Sale Shares and the said Sale Warrants from PNS.

(6) The full purchase price for the Sale Shares was Ringgit Four Hundred and Eight Million, Five Hundred and Sixty Eight Thousand, Three Hundred and Twelve and Sen Eighty (RM408,568,312.80) only.

(7) The purchase price of each Sale Warrant was the aggregate total sum of Sen Sixty One (RM0.61) per Existing Warrant and the sum of Sale Warrants that PNS subscribed for amounted to Ringgit Eighty Seven Million, Seven Hundred and Two Thousand, One Hundred and Sixty Seven (RM87,702,167).

(8) So as to facilitate the Sale and Purchase Agreement, the Appellant entered into a Guarantee Facility Agreement with the following Overseas Chinese Banking Corporation (OCBC):

(i) OCBC Ltd as 'Arranger';

(ii) OCBC Bank (Malaysia) Berhad (295400- W) as Facility Agent;

(iii) OCBC Banking Corporation Limited (LF 00363) as Issuing Bank; and

(1) OCBC Bank (Malaysia) Berhad (295400-W);

(2) OCBC Corporation Limited (LF 00363);

(3) DCB Bank Berhad (6171-M);

(4) DCB Sakura Merchant Bankers Berhad (19663-P) as Participants, on 10 October 1996.

(9) Under the Guarantee Facility Agreement, the Guarantee Facility was granted for the purpose of enabling the Appellant (ie the Borrower) to furnish to PNS an irrevocable bank guarantee; and was in the following sums:

(a) Tranche I Guarantee in the maximum amount of Ringgit Four Hundred and Seventy Three Million, Two Hundred and Ninety Nine Thousand and Three Hundred and Seventy Seven (RM473,299,377); and

(b) Tranche II Guarantee in the maximum sum Ringgit Twenty Five Million, Six Hundred and Twenty Four Thousand, Four Hundred and Ninety Three (RM25,624,493).

(10) In consideration of the banking service, that is to say, the Banking Guarantee Facility issued to the Appellant, the Appellant pursuant to Article VIII, Section 8.01(iii) undertook to pay and did pay quarterly payments of bank commission at the rate 1.2% per annum for the use of the Guarantee Facility as follows:

Akaun		Pembayaran	Amaun	Appendix
31.12.96	(1)	16.10.1996–16.01.1997	1,460,393	4
31.12.97	(2)	17.01.1997-16.04.1997	1,461,839	5.1
		17.04.1997-16.07.1997	1,465,684	5.2
		17.07.1997-16.10.1997	1,485,922	5.3
Akaun		**Pembayaran**	**Amaun**	**Appendix**
		17.10.1997-16.01.1998	1,426,887	5.4
			5,840,332	

			Lebihan peruntukan	587	
			Amaun dituntut	5,480,919	
31.12.1998	(3)		17.01.1998-16.04.1998	1,358,676	6.1
			17.04.1998-16.07.1998	1,375,774	6.2
			17.07.1998-16.10.1998	1,394,756	6.3
				4,129,206	
			Kurangan peruntukan	1,508	
			Amaun dituntut	4,127,698	

(11) According to the audited Profit and Loss for the Appellant for the year ended 31 December 1997, the profits after taxation earned by the Appellant were as follows:

(i) from 8 August 1996 to 31 December 1996; RM1,823,251;

(ii) from 1 January 1997 to 31 December 1997; RM37,232,478.

(12) The Appellant also paid extension fees amounting to RM991,425 to extend the use of the guarantee facility for one year. (Item 14, at p 8, Case Stated).

[3] The Facts Proved according to the learned Special Commissioners are set out at pp 8–10 of the Case Stated and are as follows:

(1) The Appellant is an investment holding company incorporated in Malaysia on 8 August 1996 and holds shares and warrants in Pernas International Holdings Berhad which were acquired from PNS.

(2) The Bank Guarantee was a precondition for the purchase price of the shares and warrants and PNS shall return the bank guarantee to the Appellant upon receipt of the payment of the full purchase price of the said shares and warrants. The shares and warrants were used as collateral for the bank guarantee.

(3) The full settlement of the purchase price was to be made within twelve (12) months after the date of completion of the Sale and Purchase Agreement. At the end of the twelve (12) months period, due to the economic situation, the value of the shares have depreciated. The Appellant was given an additional twelve (12) months to make full settlement.

(4) After the extended 12 months, the Bank Guarantee was surrendered back to the Bank and the Appellant pays an interest at the rate of 8% per annum to PNS on the unpaid amount of the purchase price of the shares and warrants.

(5) To date no payments for the purchase price of the shares and warrants were made by the Appellant to PNS.

(6) A standby bank loan of 250 million made available to the Appellant was never drawn down.

(7) The Appellant received the following amount of dividends as income:

(i) year ending 31 December 1997 – RM57,797,468

(ii) year ending 31 December 1998 – RM7,972,065

(8) The title in the said shares and warrants was transferred to the Appellant upon the issuance of the irrevocable Bank Guarantee and the Appellant received the dividends from thereon as shown in the audited accounts for year ending 31 December 1997 and 1998.

[4] Ground one of the appeal is that the learned Special Commissioners misdirected themselves in finding of the 'Facts Proved' to the effect that the Bank Guarantee was a 'precondition' which is stated thus:

> The Bank Guarantee was a precondition for the purchase price of the shares and warrants and PNS shall return the bank guarantee to the Appellant upon receipt of the payment of the full purchase price of the said shares and warrants. The shares and warrants were used as collateral for the bank guarantee. [Page 8, Facts Proved, Case Stated].

[5] I think the Bank Guarantee as a precondition is not a fact proved but an inference. There is no document to prove that the Bank Guarantee was a precondition for the purchase price of the shares and warrants. The following points support the submission that the learned Special Commissioners erred that the Bank Guarantee was a precondition.

(1) The Agreement for Sale and Purchase Agreement of shares dated 19 August 1996, at p 154 of Agreed Bundle of Documents Jilid II, B2 has Conditions Precedent at pp 163–165 of the said Bundle and does not anywhere stipulate that the Bank Guarantee is a condition precedent or a precondition for the purchase price;

(2) Under Clause 5.1(c), of the Agreement (p 168 of the said Bundle), the documents to be exchanged on Completion Date, inter alia, are the delivery to Perbadanan Nasional Berhad of the irrevocable Bank Guarantee for the amount equal to the full Purchase Price;

(3) Documents, including the irrevocable Bank Guarantee, which must be exchanged upon the Completion Date are not in the conditions precedent to Clause 3 of the said Agreement;

(4) The learned Special Commissioners misdirected themselves between conditions precedent (such as approvals from the relevant authorities) and the exchange of documents on Completion Date.

[6] Since the learned Special Commissioners set out in the Facts Proved, their finding that the Bank Guarantee is a precondition, and since the Appellant's submission is that this finding is a misdirection, or at best an

A inference or a conclusion of law, the celebrated case of *Chua Lip Kong v Director General of Inland Revenue* [1982] 1 MLJ 235 in relation to primary conclusions of law, is relevant and is set out as follows:

> From the primary facts admitted or proved the Commissioners are entitled to draw inferences; such inferences may themselves be inferences of pure fact, in which case they are as unassailable as the Commissioners' finding of primary fact; but they may be, or may involve (and very often do), assumptions as to the legal effect or consequence of primary facts, and these are always questions of law upon which it is the function of the High Court on consideration of a Case Stated to correct the Special Commissioners if they can be shown to have proceeded upon some erroneous assumption as to the relevant law. It is therefore, desirable that in the Case Stated the Special Commissioners should set out in a separate paragraph from that which contains their findings of primary facts such inferences as they have drawn from those primary facts in the process of arriving at their decision, so that the Court may be able to identify the true nature of the inferences: viz – whether they are pure inferences of facts or whether they involve assumptions as to the legal effect or consequences of fact; and, in the latter event, what those assumptions were.

[7] At p 238 of the Report, the Privy Council drew attention to facts which are in fact conclusions of law thus:

> Finally and most importantly, for this is the whole basis on which the Special Commissioners held that the profit made by the taxpayer, in the purchase and sale of the land was a profit from his trade as a timber merchant, is their statement that the taxpayer 'on October 25 1966, did, in fact, sell the timber obtaining in the said land to Kim Hong & Company Ltd'. This statement, although as a statement of pure fact, embodies also a conclusion of law. Whether what persons write or say or do has the effect of transferring real or personal property from one person to another by way of sale is a question of law. Either the statement means that the primary facts as agreed by the parties or found by the Commissioners to be proven had effect in law as a sale by the taxpayer of the standing timber on the land to the timber company; in which case it is plainly wrong in law; or else it is a conclusion of mixed facts and law that no reasonable Special Commissioners could have reached if they had correctly directed themselves in law. Whichever way it is looked at, it falls within the well-known principle laid down by Vincount Radcliff in *Edwards v Bairstow.* It is a conclusion or decision of the Special Commissioners which the High Court was entitled to and ought to have set aside.

[8] At p 252 of *Director General of Inland Revenue v Rakyat Berjaya Sdn Bhd* [1984] 1 MLJ 248, the Federal Court held:

> The term 'question of law' includes the correctness of (a) pure statements of law (statutory provision) and (b) inferring of a conclusion from primary facts (where the process of inference involves assumptions as to the legal effect or consequences of the primary facts.

[9] In *Mamor Sdn Bhd v Director General of Inland Revenue* [1981] 1 MLJ 117, the learned judge said:

> It has been argued that the deciding order of the Special Commissioners is entirely based on findings of facts and as such the court cannot interfere with the decision made on such findings by the Special Commissioners. With respect I am

of the opinion that it is open for the High Court to review the decision of the Special Commissioners, if the Special Commissioners:

(i) misdirect themselves on the law; or

(ii) answer the wrong question; or

(iii) omit to answer a question which they ought to have answered; or

(iv) took into account factors which they ought not to have; or

(v) reached a conclusion on facts which is not supported by the evidence before them; or

(vi) made a finding of a facts which is no reasonable person in the circumstances would have arrived at.

[10] In *Ketua Pengarah LHDN v Dr Arunjit Dutt* [1995] 2 MSTC 3454, the learned judge said:

> In its approach this Court followed the authority of the decision in *Mamor Sdn Bhd v Director General of Inland Revenue* [1981] MLJ 117 where it was held that it was open for the High Court to review the decision of the Special Commissioners, if, inter alia, the Special Commissioners had misdirected themselves on the law or reached a conclusion of facts which is not supported by the evidence before them.

[11] It is observed at p 22 of the Case Stated that the learned Special Commissioners themselves agree that under Clause 4.5 'that on completion date, the Appellant purchaser shall issue and deliver to the Perbadanan Nasional Berhad an irrevocable Bank Guarantee'. Then it is not a precondition! This misdirection with regard to the requirement of the Bank Guarantee being a precondition is a material misdirection and led the learned Special Commissioners to hold that the bank commissions paid are capital and this leads to Ground Two of the appeal. Ground Two of this Appeal is that the learned Special Commissioners erred in law when they held:

> We, the Special Commissioners find as a fact that the purpose of the bank guarantee facility was to enable the Appellant to acquire the shares and warrants which constitute the capital assets of the Appellant and hold therefore that the bank commission paid by the Appellant represent the cost of acquiring those assets.

[12] The above statement is not a fact as claimed by the Special Commissioners but a conclusion of law. See *Chua Lip Kong* (supra). The learned Special Commissioners hold that the Bank Guarantee commission paid by the Appellant is a 'cost of acquiring those assets' ie the shares and warrants. The main reason advanced for this conclusion is:

> That the purpose of the Bank Guarantee facility was to enable the Appellant to acquire the shares and warrants which constitute capital assets of the Appellant.

[13] Further, the learned Special Commissioners having concluded in error that the Bank Guarantee is a precondition to the requisition of the shares and warrants concluded the Bank Guarantee fees are capital. The learned Special Commissioners held:

(i) the bank guarantee in the instant case was a prerequisite to the acquisition of the shares and warrants of Pernas International Hotels Berhad which produced assessable income in the form of dividend. Hence the bank guarantee fees are capital in nature. (at bottom of p 24, Case Stated)

[14] At this point in time, it is noted that the learned Special Commissioners are of the view that the Bank Guarantee is 'capital' at p 24 of the Case Stated and yet at p 29 of the Case Stated the Learned Special Commissioners hold that the use of the bank guarantee facility was (a) an outgoing and an expense; (b) wholly and exclusively; and (c) incurred during the period, but was not incurred in the production of gross income of the Appellant. Herein lies a contradiction – if the bank commission fee is capital, it could not have been 'an outgoing or an expense' and wholly and exclusively incurred during the period under s 33 of the Income Tax Act 1967. It is observed that the learned Special Commissioners' conclusion of law that the Bank commission fees are capital in nature because, in their view, they were a prerequisite to the acquisition of shares and warrants, cannot be sustained as a statement of law on the following grounds:

(1) First, the Agreement for Sale and Purchase Agreement of shares dated 19 August 1996 does not provide for the Bank Guarantee as a precondition or prerequisite in any of its terms. In fact, there is no such condition in the Condition Precedents at p 10 of the said Agreement (p 163, Jilid II Agreed Bundle of Documents).

(2) The Bank Guarantee was one of the documents that had to be exchanged on Completion Date (at p 13 of Agreement and p 166 of Jilid II, Agreed Bundle of Documents).

(3) The purchase prices of the shares and warrants purchased were already fixed at RM408,568,312.80 for the shares and RM87,702,167 for the warrants, and is a fact (found at paragraph 6, p 4 of Case Stated and paragraph 7 at p 5 of Case Stated).

[15] The learned Special Commissioners dismissed the argument of the Appellant that the bank commission was a recurrent expenditure and therefore, of a revenue nature in the following terms:

> We find that this argument of the Appellant cannot be accepted as we have to look for the true nature of the transaction to ascertain whether the payments are really revenue payments for the use of an asset or instalments of a capital sum for the acquisition of an asset. The mere fact that the expenses recur do not necessarily mean that the payments are of a revenue nature. In this, though the payment recurs, the character of the payments have not changed.

[16] It is now necessary to lay out certain principles to assist in the analysis of whether the bank commission is an instalment of a capital sum as claimed by the learned Special Commissioners or of a revenue nature.

(1) In *Vallambrosa Rubber Co Ltd v Farmer* 5 TC 529, the Lord President (Lord Dunedin) established the criterion that 'capital expenditure is a thing that is going to be spent once and for all, and income expenditure is a thing that is going to recur every year'.

(2) But not all expenditure spent once and for all is capital expenditure, nor is every recurring expenditure a revenue expenditure. As Lord Romer in *Prendengast v Cameron* [1940] 23 TC 122 observed, a capital consideration say for the sale of land is capital even if paid in instalments spread over a number of years.

(3) A one-time payment made to get rid of an unsatisfactory director is still a revenue expenditure (*Mitchell v BW Noble Ltd* 11 IC 372). A

(4) In *Scoble & Ors v Secretary of State in Council for India* 4 TC 478, the purchase price of a railway company was settled by way of an annuity over a term of years instead of a lump sum. The House of Lords held that the payments were instalments of purchase money and therefore capital. B

[17] Thus, in the instant case, is the bank commission a purchase price of the shares and warrants paid over a period in instalments? The answer is obvious: the purchase prices of the shares and warrants was already determined at RM408,568,312.80 and RM87,702,167 respectively. The learned Special Commissioners conclusion that the bank commissions paid were instalments of the purchase price is against the facts and cannot be sustained. Instalments of purchase price refer to the price of the asset, in this case shares and warrants. Are the bank commission fees the cost of acquiring the assets? At p 29 of the Case Stated, the learned Special Commissioners held: C D

> From the evidence adduced before us, we find as a fact that:
>
> (i) the bank guarantee facility is to ensure the full settlement of the purchase price of the shares and warrants by the Appellant within the stipulated period. The shares and warrants were transferred to the Appellant upon the receipt of the Bank Guarantee Facility.
>
> (ii) the purpose of the Bank Guarantee Facility was to enable the Appellant to acquire the shares and warrants which constitute the capital assets of the Appellant. Therefore, the bank commission paid by the Appellant represents the cost of acquiring those assets. E

[18] The above is an inference and not a 'fact' as claimed by the learned Special Commissioners. In fact, the so called fact in (ii) above, is a contradiction to an agreed fact in item 10, p 6, of the Case Stated which clearly states that the bank commission is 'in consideration of the banking service', ie the Banking Guarantee Facility and was (ii) for the use of the Guarantee Facility (at item 10, p 6 Case Stated). F

[19] The statement of Agreed Facts, in item 6 stipulates that: 'The full purchase price was RM408,568,312.80.' And this is a Fact Admitted at p 4 item 6 of the Case Stated. The statement of Agreed Facts in item 7 stipulates the purchase price of the warrants at RM87,702,167 and this is a Fact Admitted at p 5 item 7 of the Case Stated. The learned Special Commissioners have no authority to go behind a Statement of Agreed Facts. See *Chua Lip Kong v Director General of Inland Revenue* [1982] 1 MLJ 235, where it is held: G H

> The Special Commissioners, in their Lordships' view, were not entitled to go behind this statement. It was not merely part of the evidence before them which they were entitled either to accept or to reject as they thought fit.

[20] Therefore, it is not open to them to say that the bank commission 'represents the cost of acquiring those assets'. There are no facts to support this conclusion. I

[21] In *Bombay Steam Navigation Pte Ltd v Commissioners of Income Tax Bombay* (1965) 56 ITR 52, considered in *Director General of Inland Revenue v Rakyat Berjaya Sdn Bhd* [1984] 1 MLJ 248, a company acquired various business assets for a purchase price, partly left owing and carrying interest at 6%. The Supreme Court of India held that the interest paid was deductible under s 10(2) which section reads:

> Any expenditure not being an allowance of the nature described in any of clauses (i) to (xiv) inclusive and not being in the nature of capital expenditure of personal expenses of the assessee laid out or expended wholly and exclusively for the purposes of such business.

[22] *Rakyat Berjaya Sdn Bhd* (supra) is our Federal Court decision and held that:

> The wording of s 10(2)(xv) (Indian Statute) is slightly different from our s 33(1) of the Income Tax Act but I think the effect is very much similar.

[23] In other words, the interest paid does not become instalments of the purchase price of the asset, nor the cost of acquiring those assets.

[24] *Ben Odeco Ltd v Powlson* [1978] 2 All ER 111, is also considered in *Rakyat Berjaya* (supra) which is also supportive of the decision to the effect that interest is not consideration for whatever asset the debtor acquires with credit. In *Ben Odeco* (supra), a company paid interest on money borrowed to pay for an oil rig. It was argued that the interest was capital expenditure on the provision of the oil rig. The House of Lords rejected the argument and held that interest payments were 'expenditure on the provision of money to be used on the provision of plant, but not expenditure on the provision of plant.'

[25] *Hudson's Bay Company v Thew* 7 TC 206 is also considered in *Rakyat Berjaya* (supra), where a company sold land on terms whereby part of the price was left owing and interest was payable on the debt. It was there argued that the interest was a capital receipt, like instalments of the basic price. Rowlatt J held it to be 'interest on unpaid monies' not capital.

[26] Thus, the bank commission fees in the instant case do not become capital because they form no part of the purchase price which, as an agreed fact was already determined. (See items 6 and 7 of the Facts Admitted, pp 4 and 5 of Case Stated). The learned Special Commissioners also rejected the argument of the Appellant that the bank commission fees paid were akin to 'interest'. It appears that the learned Special Commissioners misconceived the argument. It is not that bank commission fees are the same as interest, which is allowable under s 33(1)(a) of the Act, but that the bank commission fees are analogous to interest payments on loans and should be considered as falling under revenue expenditure under the general opening s 33(1) of the Act. There are authorities to suggest that a guarantee is analogous to a loan. In *Garforth v Tankand Carpets Ltd* [1980] STC 251, a taxpayer company carried on business as carpet manufacturers and guaranteed 41,920 which he had to make good. The guarantee loss was disallowed as not incurred in the production of income. But note that this

case is not a case of a deduction for bank commission fees payable but a loss arising on making the guarantee itself. What is relevant to the case at hand is that Walton J held:

> ... I do not think, that there is any real difference between giving a guarantee and the loan of money to the company concerned.

[27] *Meadowcroft v Commissioner of Inland Revenue* [1964] NZCR 108 reported at p 9403 Malaysian Tax Report Vol 1, a taxpayer who gave a guarantee in respect of bank overdrafts of a company had to make good his guarantee. Haslam J held:

> … 1 think that the appellant … expressly risked his capital ... as if he had advanced the cash himself on loan to the company. I make this latter observation being well aware of the dangers in this difficult terrain of walking into the ambush of analogy.

[28] The cases cited above dealt with the loss of the guarantee itself and are not applicable to bank commission fees paid by the Appellant. But these cases show that a bank guarantee is analogous to a loan and it follows 'interest' paid on loans are analogous to bank commission fees paid on a guarantee and fall under a 'revenue expense'. The learned Special Commissioners in the instant case did not have the benefit of the above cases.

[29] In *Lunt v Wellesley* 27 TC 78, a film writer gave a guarantee to a bank in respect of a company, besides advancing monies to the company to produce a film, but this resulted in a failure and the monies advanced to the company and the whole guarantee (not bank commission fees in respect of the guarantee) were considered by Macnaghten J as a revenue expense where he held at p 84 'that to describe it as capital in the business of an artistic film producer seems to me to be a misuse of language, however widely the word be understood.'

[30] It is observed that in the instant case the business of the Appellant is an agreed fact, that is, the Appellant carries on the business of an investment company from which dividends are derived. The bank commission fees like interest on a loan are a cost of producing the dividends, and hence revenue in nature. In *Hoechst Finance Ltd v Gumbrell* [1981] STC 127, a parent company agreed to guarantee the principal and interest on loan stock raised by the taxpayer company. But the taxpayer company had to pay a commission of 0.25% per annum on the amount of loan stock outstanding in respect of the guarantee (at p 133 of the Report). The taxpayer company sought to deduct the payments of commission to the parent company as 'expenses of management'.

[31] The statutory provision considered read as follows:

> In computing for the purposes of corporation tax of total profits for any accounting period of an investment company resident in the United Kingdom there shall be deducted any sums disbursed as expenses of management (including commissions) for that period, except any such expenses as are deductible in computing income for the purposes of Schedule A. (at p 134 of the Report)

[32] Nourse J held that payments in respect of the parent company's guarantee were not of a capital nature. His Lordship held as follows:

> (1) But here the proceeds of the issue of loan stock were immediately lent on to other companies in the group is discharge of the taxpayer company's function of assisting in financing those companies. Therefore, the guarantee commission is in substance part of the price, which the taxpayer company has to pay from time to time in order to maintain that assistance, and as such it is an expense to which it is put in conducting its business, (at p 137 of the Report).
>
> (2) Secondly, while it is clear that default by the taxpayer company in payment of the commission would not determine the liability of the parent company to the trustees under the guarantee, each half yearly payment of commission ought properly, as it seems to me, to be regarded as a payment for the guarantee during the previous six months, particularly when it is borne in mind that its amount can, and it due course will, vary in accordance with the amount of the loan for the time being outstanding. This was a point on which counsel for the taxpayer company particularly relied, (at p 137 of the Report).
>
> (3) Thirdly, although I agree with counsel for the Crown that the fact that the commission is paid periodically cannot by itself transform what would otherwise be an expense of the issue into one of management, the variable basis on which it is to be computed from time to time would nevertheless have made it difficult for it to be in one lump sum. Mr Stillwell was not asked about this, but I think I must assume that he would have thought it inappropriate, if not impracticable, for the commission to have been charged and paid by way of a lump sum. That means that the commission does have the characteristics of a genuine periodical payment more akin to an expense of conducting the business than to an expanse of the issue. (at p 138 of the Report).

[33] His Lordship went to say that the learned Special Commissioners in that case:

> … did not in my view pay sufficient regard to the nature of the taxpayer company's business and the close relation to it of the guarantee commission as a means of maintaining the financial assistance which it was its function to give.(at p 138 of Report).

[34] While the statutory provision of s 304 of the United Kingdom Tax Act 1970 is vastly different from our s 33(1) of the Act, the importance of the case is that it shows that guarantee bank commissions need not refer to the cost of raising capital where they are incurred in the course of operation of a business, as is the case here, because the business was that of carrying investment producing dividends which needs financial assistance, which is the Bank Guarantee. In *Jenning v Barfield* 40 TC 365, a firm of solicitors guaranteed a bank overdraft for a client, but the client went bankrupt and the solicitors had to pay the guaranteed sum. Pennycuick J allowed the whole guarantee sum as 'wholly and exclusively incurred' as it was established that it was the practice of solicitors to give such guarantees.

[35] In *ML & Ors v Ketua Pengarah Hasil Dalam Negeri* [2000] MSTC 3804, Mokhtar Sidin JCA delivering the judgment of the Court of Appeal said:

> Thus, if a taxpayer takes a loan he is entitled to claim deductions for the interest that he has paid in that year.

[36] If the bank commission and fees for the extension of the bank guarantee are analogous to interest on a loan, then it follows that such bank commission fees are allowable deductions.

[37] The bank commission fees paid in the instant case pass another test set by the Court of Appeal in *ML & Ors* (supra) namely: 'do the payments create any intangible assets', or for that matter, do the payments create any asset? (at p 3811 of the Report). In *ML & Ors* (supra), the Court of Appeal held:

> It is clear that the payments did not create any intangible asset. They were incurred to produce income.

[38] The facts in *ML & Ors* (supra) briefly were as follows:

> The taxpayers were awarded a timber licence by the Sabah Government. The terms of the licence required that they pay to the Government certain nett proceeds based on the size of trees extracted. The payments were instituted as a matter of policy adopted by the Government to encourage agricultural development or re-forestation on land from which timber had been extracted. The taxpayers could apply for the funds to be released to them to be used for agricultural development of the land, though there was no guarantee that a refund could be made to them as they would not be entitled to the refund if no agricultural development on the land was carried out.

[39] Expenses relating to capital assets are fully deductible when such expenses do not bring in an asset or an intangible asset. Thus, in the case of *Southern v Borax Consolidated Ltd* [1941] 23 TC 597,Lawrence J held:

> It appears to me that the legal expenses which were incurred by the Respondent Company did not create any new asset at all but were expenses which were incurred in the ordinary course of maintaining the assets of the company, and the fact it was maintaining the title and not the value of the Company's business does not, in my opinion make it any different. I am of opinion that there is nothing in the cases which deal with payments that are made by an owner in respect of property which he owns in England property which is liable to taxation under Schedule A, which renders it impossible for the tribunal of fact to find that expenditure in connection with land abroad not subject to Income Tax under Schedule A was wholly and exclusively laid out for the purposes of the company's trade.

[40] It is observed that the learned Special Commissioners totally ignored a fact of paramount importance, namely that the Appellant paid 'arrangement fees' of RM2,478,561 in respect of the bank guarantee. This is different from the bank commission of RM1,460,393 (p 1 B1) for the year of assessment 1997, RM584,919 for the year of assessment 1998 (p 7, B1). The arrangement fee of RM2,478,561 appears in the Respondent's (IRB) letter of 1 September 1998 at page 1, Agreed Bundle of Documents, Exhibit B1. While the bank commission was annual and thus recurring, the 'arrangement fees' were paid once and for all. The Appellant does not dispute that 'arrangement fees' are capital since it is preparatory to the bank guarantee but disputes the Respondents not allowing the bank commissions, which are recurring, and thus a revenue expenditure. Nowhere in the Case Stated did the learned Special Commissioners distinguish between the 'arrangement fees' and 'the bank commission'. It is an agreed fact (i) that the bank commissions were at 1.2% per annum for the use of the Guarantee Facility;

and (ii) the bank commissions were in consideration of the banking service (Agreed Facts Statement in item 10, p 6, Case Stated). Again, the learned Special Commissioners cannot go behind a Statement of Agreed Facts. See *Chua Lip Kong* (supra). If the payments are for a banking service, then it is not open to the learned Special Commissioners to hold it as the cost of the shares! What brought into effect the Bank Guarantee? Certainly, it was not the bank commission. There is no finding of fact to this effect and rightly so because what brought the Bank Guarantee into effect was:

(1) The shares and warrants, which were used as collateral for the bank, guarantee. This is a fact proved at item 2 p 8 Case Stated. Indeed, there would be no Bank Guarantee if not for the collateral of the purchased shares and warrants.

(2) Towards that end of the security, the shares and warrants were given as collateral and a Memorandum of Deposit and Mortgage Agreement was entered into (at p 273 of Agreed Bundle of Documents Jilid III, B3).

(3) Clauses 2.2.1 and 2.2.2 of the Memorandum of Deposit and Mortgage demand the deposit of the said securities.

(4) Clauses (B) of the said Memorandum clearly spells out that:

> one of the conditions precedent to the availability of the Guarantee Facility is the execution and delivery of this Memorandum of Deposit and Mortgage. (at p 275 of Agreed Bundle of Documents, B3).

(5) Under the said Memorandum, all dividends are to be paid into an Escrow Account to the Security Agent (at p 2828 B3 Clause 5.1).

(6) There is also a Security Agency Agreement at p 308 Agreed Bundle of Documents B3 which provides the Security Agent with powers of enforcement including sale of the securities (at p 314 of B3).

(7) It is abduntly clear that the purchase price of the shares and warrants remained at RM408,568,312.80 (shares) and RM87,702,167 (warrants) (at pp 4 and 5 of Case Stated). The payment for the use of the bank guarantee did not in any way increase the capital of the Appellant (Fernrite). The bank commission payments in question did not create the Bank Guarantee, which was created by (i) the Memorandum of Deposit and Mortgage, and (ii) arrangement fees.

[41] I think in the instant case what must be resolved is the issue whether the bank commission fees incurred are capital or revenue by applying the test in the Court of Appeal case *ML & Ors* (supra), namely, did the expenditure bring in or create an asset? I am of the opinion that it did not create any asset on the grounds that:

(1) The Bank Guarantee was created by the Memorandum of Deposit and Mortgage (p 273 of Exhibit B) under which the shares and warrants were given as collateral for the Bank Guarantee (see item 2, Facts Proved, p 8 Case Stated).

(2) The 'Arrangement Fee' was paid in one lump sum in respect of the Bank Guarantee (p 1, Agreed Bundle of Documents, B1). The arrangement fee was one factor bringing in or creating the asset, the Bank Guarantee.

(3) The bank commission fee was annual and recurring (1.2% per annum for the use of the Guarantee facility) and it is an agreed fact that these payments were for the banking service. There is no evidence or finding of fact that the bank commissions were instalments of the purchase price.

(4) The bank commission fees did not add to the purchase price of the shares and warrants because the full purchase price was RM408,568,312.80 (shares) and RM87,702,167 (warrants) (Item 6 and 7 of Facts Admitted, pp 4 and 5 of Case Stated). The bank commission fee was for a short period of 16 Ocotboer 1996 to 10 Janauary 1998 as Lord President in *Scottish North American Trust v Farmer* 5 TC 693 at p 702 said:

> I cannot see how temporary accommodation in the course of business ever is or ever can be capital.

(5) When the Bank Guarantee was surrendered, the Appellant paid 8% interest on the purchase price owing (see p 9, Case Stated, item 4 Facts Proved). The 8% was allowed by the Respondent under s 33of the Act (see p 1, of Appellant's Bundle of Documents, Exhibit B1), where there is no disallowance for the interest paid in the tax computation.

[42] More important, the 8% interest per annum was on the purchase price and did not include the bank commission under dispute in this appeal and this underscores the point made that the bank commission was not part of the purchase price paid in instalments like the case in *Scoble* (supra). In the Malaysian case of *FCD v Director General* [1992] 2 MSTC 2181, the learned Special Commissioners allowed guarantee fees in respect of bank loans as an expense 'wholly and exclusively' incurred in the production of income. This decision was upheld by the High Court in *Ketua Pengarah Hasil Dalam Negeri v FCD* (unpreported, Case No R1-14-3-1993). While the learned Special Commissioners quoted and cited the High Court case of *Seabanc Kredit Sdn Bhd* [1998] MSTC 3695, the learned Special Commissioners made no attempt to reconcile the decision in *FCD* (supra) with their decision in the instant case. Since the learned Special Commissioners quoted from the case *Seabanc Kredit Sdn Bhd* [1998] MSTC 3695, this case must be considered in detail. The facts in this case were as follows:

> The taxpayer, a finance leasing company carried out hire purchase financing and lease financing in Malaysia. The taxpayer raised bank loans between the period of 1982 to 1989 to carry out its business. In doing so it had incurred expenditure in the form of loan processing fee, legal fee, loan management fee, stamping fee, guarantee fee, facility fee, arrangement fee and commitment fee.
>
> The issue was whether the expenses incurred in acquiring the bank loans were revenue expenditure and allowable as deductions under s 33(1) of the Income Tax Act 1967 ('the Act') or capital expenditure and therefore not deductible.

[43] The learned judge in *Seabanc Kredit* (supra), in rejecting the view held by the learned Special Commissioners that the guarantee fees were deductible for tax purposes, held:

> Sad to say that the Commissioners seem to be more concerned on the nature of the business of the respondent rather than the true nature of the expenses incurred as the basis of their decision. In the present case, the payment of the various fees is the cost of the respondent, which it has to pay in order to get the loan. The expenses are not wholly and exclusively incurred in the production of income as they relate to the matter of bringing into existence the asset, namely the sum of money which is to be put to use in order to produce assessable income and hence they are capital in nature. Thus, the claim for deduction for the expenses so incurred under s 33(1) of the Act cannot be entertained and should be rejected.

[44] The learned judge in *Seabanc Kredit* (supra) then went on to refer to the following cases to support his findings:

(a) *Texas Land & Mortgage Company v Holtham* [1894] 3 TC 255;

(b) *Ure v Federal Commissioners of Taxation* (SC) 80 ATC 4264.

[45] First, the case of *Taxes Land & Mortgage Company v Holtham* [1894] 3 TC 255 is considered.

> A English company during three years ending 5 April 1890 issued certain debentures and debenture stock. The expenses of the issue and placing of such debentures and debenture stock consisted of commission and fees paid to agents and brokers for placing debentures and debenture stock, cost of stamps on debentures and postage and printing, advertising and law charges. (At p 258 of Report [1894] 3 TC 255)

[46] A prospectus was issued on the issue of debentures and debenture stock (at p 259 of the Report [1894] 3 TC 255). Mathew J held 'To increase its capital it raised money on debentures' (at p 260 of the Report [1894] 3 TC 255), and dismissed the argument of deduction holding: 'We are clearly of the opinion that that cannot be done' [at p 260 of the Report [1894] 3 TC 255).

[47] It is observed that the learned Judge in *Seabanc Kredit* (supra) made no attempt to distinguish the facts before him in *Seabanc Kredit* (supra) from *Texas Land & Mortgage* (supra). In *Taxes & Mortgage* (supra), the expenses were in connection with increasing capital by way of debentures and debenture stock. In *Seabanc Kredit* (supra), the costs were incurred in the raising of a bank loan, ie borrowing money for its business operations. In the instant case, the bank commission fee is not to increase capital; it is incurred to finance the purchase of stock and shares, which produced dividend income. The bank commission fee, therefore, cannot be assigned to the cost of purchase which was already determined and found as a fact to be:

(i) RM408,568,312.80 (item 6, Facts Admitted at p 3, Case Stated).

(ii) RM87,702,167 (item 7, Facts Admitted at p 5, Case Stated).

[48] Second, the case of *Ure v Federal Commissioners of Taxation* (SC) 80 ATC 4264 is considered. The learned judge in *Seabanc Kredit* (supra) went

on to quote extensively from Lee J's judgment in *Ure* (supra) but it is not necessary to repeat it here. Suffice to say that Lee J's judgment was superceded by Brenan J's judgment at the Federal Court. The learned judge in *Seabanc Kredit* (Supra) went on to hold:

> The case went up on appeal to the Federal Court of Australia [*Ure v FC of Taxation* 81 ATC 4100] where the decision on the expenses was overruled by virtue of the provisions under sec 67(1) of the Income Tax Assessment Act 1936-1976 which states:
>
> 'Subject to this section, so much of the expenditure incurred by the taxpayer in borrowing money used by him for the purpose of producing assessable income as bears to the whole of that expenditure the same proportion as the part of the period for which the moneys was borrowed that is in the year of income bears to the whole of that period shall be an allowable deduction.'
>
> It is to be noted that there is no equivalent provision of the Australian sec 67(1) in our Act. However, sec 51(1) is identical with our sec 33(1).

[49] It is observed that the learned judge in *Seabanc Kredit* (supra) quoted Lee J's judgment (at the Supreme Court level) which was superceded by Brenan J's judgment at the Federal Court, which judgment laid parameters and conditions which curtailed the efficacy of Lee J's judgment. The relevant portions of Brenan J's judgment at the Federal Court are as follows:

> Lee J upheld the Commissioner's apportionment of interest and other charges. It will be necessary to return to the question of apportionment, but it is convenient first to refer to the guarantor's fees, which were submitted to be deductible under sec 51. Lee J rejected that submission, holding that the guarantor's fees paid to Listohan and Weston were 'expenditure necessary to obtain the loans' and that the obtaining of the guarantees was 'a step preparatory to the earning of income'. In reliance upon Canadian authority: *Bennet & White Construction Co Ltd v MNR* [1949] Can TC 1; [1949] SCR 287, his Honour held that the guarantor's fees were expenditure of a capital nature. Some guarantor's fees may be of a capital nature, especially when they are paid once and for all as an expense in establishing a continuing facility, but in the present case the evidence (which was extremely sketchy) shows no more than annual payments to the guarantors. His Honour found (and the finding is not challenged) that the guarantor's fees were payable annually during the currency of the loan. Though a guarantor may be unable unilaterally to revoke his guarantee or to procure the discharge of any security he has given over his assets while the guarantee stands, annual guarantor's fee may not be payable if the liability of the principal debtor is discharged during the year or if the guarantor fails to perform the obligations imposed by the contract of the agreement between the principal debtor and the guarantor. But if the annual fee be payable as consideration for the due performance of the guarantor's obligations during the year, that factor tends to stamp the fee with the character of a revenue payment; it is part of the price by the debtor for the use of the borrowed money during the period to which the payment relates. In the absence of any evidence as to the terms of the agreement relating to guarantor's fees between Mr Ure on the one hand and Listhon and Weston respectively on the other, the inference I draw from his Honour's finding that the payments were annual payments is that each payment was the price not of the giving of the guarantee but consideration for the due performance of the

guarantee during the period to which the payment relates. I would thus hold that each payment was of a revenue nature and the guarantor's fees fall to be apportioned under section 51 in the same way as the interest charges.

[50] Lee J's judgment quoted by the learned judge in *Seabanc Kredit* (supra) was not entirely approved by the Federal Court. It is difficult to understand as to why the learned Judge in *Seabanc Kredit* (Supra) did not address the judgment of Brenan J which judgment is directly contrary to Lee J's views. Again, the learned judge in *Seabanc Kredit* (supra) expresses that 'the decision on the expenses was overruled by virtue of the provisions under s 67(1) of the Australian Income Tax Act Assessment Act 1936-1976 (at p 3698 of *Seabanc Kredit*). This is not entirely correct as Brenan J at the Federal Court allowed the guarantee under s 51 of the Australian Act and ruled that s 67 was not applicable. Brenan J held:

> The liability to pay them had not arisen when the money was borrowed. Therefore, those fees do not fall within and may not be apportioned under s 67(1). (at p 490 of the Report).

[51] It was Deane and Sheppard JJ, who ruled that the guarantee fee was deductible under s 67(1) of the Australian Act. But it must be emphasised, both Deane and Sheppard JJ, did not rule out the allowability of the guarantee fees under s 51 of the Australian Act.

[52] On this point the learned judge held:

(1) The appellant claims to be entitled to deduct the whole of the interest and guarantee fees paid in the tax year pursuant to the provisions of section 51(1) of the Income Tax Assessment Act 1936 ('the Act'). He claims to be entitled to deduct the appropriate proportion of section 67 of the Act. If he is not entitled to deduct the interest and guarantee fees pursuant to section 51(1), he alternatively claims to be entitled also to deduct the appropriate proportion of those outgoings pursuant to section 67. [at p 492 of Report]

(2) Section 51(1) of the Act provides, so far as is material, that all losses and outgoings to the extent to which they are incurred in gaining or producing assessable income or are necessarily incurred in carrying on a business for the purpose of gaining or producing such income shall be allowable deductions except to the extent to which they are losses or outgoings of capital or of a capital, private or domestic nature. It is common ground that the appellant was not carrying on any business at any relevant time. The primary issue between the parties, in so far as section 51(1) is concerned, is to what, if any, extent the interest and the guarantee fees were, for the purposes of the subsection, losses or outgoings incurred by the taxpayer in gaining or producing the assessable income not being losses or outgoings of capital or of a capital, private or domestic nature. If they were partially, but not wholly, of such a character, a further question arises as to 'the extent to which' they are deductible under the subsection.'[at pp 299–300 of Appellant's Bundle of Authorities].

(3) The claim for a deduction pursuant to section 51(1) in respect of the guarantee fees raises the additional question whether the outgoings in respect of them should properly been seen as outgoings of capital. These guarantee fees were paid in respect of the first and the third loans.

> In relation to the first loan transaction, the advantage sought and obtained by the incurring of the obligation to pay guarantee fees was the provision by Listhon of a guarantor's mortgage over its Balmain property. In the third loan transaction, the advantage sought and obtained by the incurring of the obligation to pay guarantee fees was the provision by Weston of guarantor's charge 'by way of floating security' over the assets of the family trust. In each case, the guarantee and security were presumably given once and for all and would continue to subsist regardless of whether any guarantee fees payable by the taxpayer to the guarantor were paid. As, presumably, the provision of security was essential in the case of each loan, the outgoings incurred to procure the guarantees and securities were expenditure for the establishment, rather that the maintenance, of the loans. They were expenses of obtaining the loan rather than part of the price payable to the relevant lender for the use of his money. It is common ground that the appellant was not carrying on a business involving the obtaining of loans.
>
> All of the above considerations tend to support Lee J's conclusion that the guarantee fees should properly be characterized as outgoings of capital. The significant consideration tending to militate against the view is that the guarantee fees were apparently payable to the guarantors on annual basis and were calculated by reference to a percentage of the principal of the relevant loan. The bare fact that the guarantee fees were payable on an annual basis as a percentage of the principal of the relevant loan would not, as a matter of necessity, preclude their being characterized as outgoings of capital if other relevant factors were, on the assessment of al relevant considerations, found to warrant that conclusion. In the assessment of relevant factors, it would be important to know the precise nature and content of the agreement pursuant to which the guarantee fees were payable. No material containing that information is before this Court. [At pp 303–304 of Appellant's Bundle of Authorities].

[53] It is plain that both Deane and Sheppard JJ left the possibility of allowing guarantee fees under s 51 open. Having founded his judgment on *Ure* (supra), the learned judge in *Seabanc Kredit* (supra) buttressed it with an error of law by stating:

> However section 51(1) is identical with our section 33(1). [at p 3695 of Report].

[54] Before demonstrating the error of law, it must be noted that the learned judge in *Seabanc Kredit* (supra) assumed that the guarantee fees in *Ure* (supra) were disallowed under s 51(1) of the Australian Act. This of course, as demonstrated above, is not correct as the judgment of Brenan J, allowed the guarantee fee under s 51(1) and Deane and Sheppard JJ, wanted more information of the terms of the guarantee fee before they could arrive at a decision. And now to demonstrate how the learned judge in *Seabanc Kredit* (supra) erred in law, s 51(1) of the Australian Act reads:

> [Losses and outgoings] All losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income, or are necessarily incurred in carrying on a business for the purpose of gaining or producing such income, shall be allowable deductions except to the extent to which they are losses or outgoings of capital, or of a capital, private or domestic nature, or are incurred in relation to the gaining or production of exempt income.

[55] Section 33(1) of our Income Tax Act 1967 reads:

> (1) Subject to this Act, the adjusted income of a person from a source for the basis period for a tear of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source, including -
>
> (a) Subject to subsection, any sum payable for that (or for any part of that period) by way of interest upon any money borrowed by that person and;
>
> (i) employed in that period in the production of gross income from that source; or
>
> (ii) laid out on assets used or held in that period for the production of gross income from that source;
>
> (b) rent payable for that period (or for any part of that period) by that person in respect of any land or building or part thereof occupied by him in that period for the purpose of production gross income from that source;
>
> (c) expenses incurred during that period for the repair of premises, plant, machinery of fixtures employed in the production of gross income from that source or for the renewal, repair or alteration of any implement, utensils, articles (the expenditure on which would be qualifying plant expenditure for the purposes of Schedule 3) or any means of conveyance, excluding the cost of reconstructing or rebuilding -
>
> (i) any premises, buildings, structures or works of a permanent nature;
>
> (ii) any plant or machinery; or
>
> (iii) any fixtures; and
>
> (d) such other deductions as may be prescribed.

[56] Section 51(1) of the Australian Act allows dual purpose expenditure to be apportioned to the extent it is incurred. But s 33(1) of our Income Tax Act 1967 does not allow any apportionment of dual purpose expenditure because for an expenditure to be allowed under our s 33 of the Income Tax Act 1967, it must be 'wholly and exclusively' incurred. Thus, the said sections are not identical. In *Ure* (supra), the judgments therein speak of 'to the extent'. At any rate in *Ure* (supra) it was held:

> (1) interest and guarantees' fees which was deductive under section 51 were allowed to the extent of $660, being the amount of income derived from the lending. [at p 485 of Report]
>
> (2) claims under section 67 in respect of legal expenses and valuation fees should be allowed and the assessment amended accordingly. [at p 485 of Report]

[57] It is to be noted that 'guarantees' fees' were allowed under s 51 of the Australian Act by Brenan J. *Murgatroyd (Inspector of Taxes) v Evens-Jackson* [1967] 43 TC 581 is an example of dual purpose expenditure. In that case, a taxpayer claimed 60 per cent of nursing home charges incurred while he was hospitalised due to an accident. Though he held conferences with his clients etc in his hospital room, his claim for 60 per cent of the charges was

'fatal since implicit in his claim was the admission that the expenses involved a dual purpose.' But the telephone charges incurred in respect of his business were allowed as 'wholly and exclusively' incurred since the expenses were actual expenditure incurred without any other purpose (p 199 of 2001 Malaysia Tax Handbook).

[58] The facts in *Ure* (supra) need attention since facts have an impact on decisions arrived at. They are as follows:

(1) the taxpayer was an employee who made three borrowings:

(i) an amount of $17,000 at an interest rate of 10% pa from HR and MM Williams on 29 October 1973;

(ii) an amount of $17,500 at 7.5% pa from the Commonwealth Savings Bank and a further amount of $2,500 at 8.5% pa from the Commonwealth Trading Bank – both loans being made by the taxpayer and his wife as joint borrowers; and

(iii) an amount of $29,000 at an interest rate which varied but approximated 12 to 12.5% and was made about 15 August 1974 by T A Davis.

In the return of income for the year ended 30 June 1976 the taxpayer sought a deduction of $8,736 which represented interest, guarantors fees, legal expenses and valuation fees in respect of the loans, the latter two items being claimed on a proportional basis under section 67.

(2) During the income year, Mr Ure received $660 interest upon money lent by him: $170 from Mrs Ure and $490 from Listohan.

(3) Mr Ure sought to deduct $ 8736 from his interest income of $660. [at p 487 of Report].

(4) It was common ground that the Mr Ure was not carrying on any business at any relevant time [at p 492 of Report].

[59] These facts are different from the instant case:

(1) First, the Appellant in the instant case is a company and not an individual as in *Ure* (supra). Thus, in *Ure*, expenses beyond $660 were considered private and domestic in nature.

(2) Second, Mr Ure was not in business. But in the instant case the Appellant is in business. It is a Fact Admitted that the Appellant 'carries on business of an investment holding company' (p 3, Case Stated).

[60] In *Ure* (supra), there was no dividend income. In the instant case there is a fact found that there is dividend income as business income as follows: [item 7, p 9 of Case Stated read with item 1, Facts Admitted p 3, Case Stated].

(i) year ended 31 December 1997 – dividend of RM57,797,468 was received;

(ii) year ended 31 December 1998 – dividend of RM7,972,065 was received.

[61] In *Ure* (supra) Deane and Sheppard JJ did contemplate a deduction if an expense produces dividend income:

> ... the liability to pay the interest may plainly have been wholly incurred in earning assessable income where it is expected or hoped that the re-lending will also lead to assessable income in another form being derived or preserved, such as for example on shares held in the company to which the money is left at a favourable rate. (at p 493 of the Report).

[62] Although it is 'interest' that is being mentioned above, it does contemplate other expenses such as guarantee fees where dividend income is hoped or contemplated. The purpose of analysing that case is to show that the quotation from the judgment in that case by the learned Special Commissioners in the instant case does not support the decision of the learned Special Commissioners because, as demonstrated, the judgment is not entirely correct in its cited authorities.

[63] Ground Three is that the learned Special Commissioners erred in law when the fact admitted was that the Appellant Fernrite Sdn Bhd 'carries on the business of an investment holding company' (at item 1, p 3 of Case Stated) and rejected the Appellant's argument that 'as an investment holding company it is carrying on the business of an investment holding company and its business income is the dividend received from the shares.' [at page 25 of Case Stated] and went on to hold:

> Being an investment holding company, the income of the Appellant by way of dividend is therefore, assessable under s 4(c), of the Act. [at p 28 case Stated]

[64] The learned Special Commissioners quoted two authors in respect of an investment holding company being taxed under s 4(c) of the Act as non-business income (at pp 25–28 of Case Stated). It is patent that the learned Special Commissioners misdirected themselves:

(1) First, the learned Special Commissioners are bound by the Facts Admitted in the 'Statement of Agreed Facts'. See *Chua Lip Kong v. Director General of Inland Revenue* [1982] 1 MLJ 235 at p 237 where it is held:

> The Special Commissioners, in their Lordships' view, were not entitled to go behind this statement. It was not merely part of the evidence before them which they were entitled either to accept or to reject as they thought fit.

(2) Second, it was an agreed fact that the Appellant carried on the business of an investment holding company, and the learned Special Commissioners conclusion that the dividend income is to be taxed under the non-business provision of s 4(c) is an error of law.

(3) Third, the deduction s 33(1) of the Act applies to all sources of income and, thus, the learned Special Commissioners cannot reject the Appellant's arguments as above.

(4)(a)Fourth, the learned Special Commissioners made no mention of s 60F of the Income Tax Act 1967 which applies to Investment Holding Companies and expressly does not refer to expenses under s 33(1) of the Act, and states thus:

(1) Where an investment holding company is resident for the basis year for a year of assessment there shall be deducted in arriving at the total income before any deduction falling to be made under section 44(1)(c) an amount in respect of expenses incurred by that company in the basis period for that year of assessment, which amount shall be determined in accordance with the formula:

$$A \times \frac{B}{4C}$$

where

A is the total of the permitted expenses incurred for that basis period reduced by any receipt of a similar kind;

B is the gross income consisting of dividend, interest and rent chargeable to tax for that basis period and

C is the aggregate of the gross income consisting of dividend (whether exempt or not), interest and rent and gains made from the realisation of investment for that basis period.

Provided that:

(a) the amount of deduction to be made shall not exceed five percent of the gross income consisting of dividend, interest and rent for that basis period; and

(b) where, by reason of an absence or insufficiency of aggregate income for that year of assessment, effect cannot be given or cannot be given in full to any deduction falling to be made to the investment holding company under this section for that year, that deduction which has not been so made shall not be made to the investment holding company for any subsequent year of assessment.

(2) In this section:

'investment holding company' means a company whose activities consist wholly in the making of investments and whose income is derived therefrom;

'permitted expenses' means expenses incurred by an investment holding company in respect of-

(a) directors' fees;

(c) wages, salaries and allowances;

(c) management fees;

(d) secretarial, audit and accounting fees, telephone charges, printing and stationary costs and postage; and

A (e) rent and other expenses incidental to the maintenance of an office,

which are not deductible under section 33(1).

(b) Thus, expenses not deductible under s 33 are allowed under s 60F upon the formula as above and in respect of defined expenses. Expenses falling under s 33 of the Act are still allowable under that section.

B

(5) Fifth, the learned Special Commissioners failed to be directed by the Privy Council case of *American Leaf Blending v Director General of Inland Revenue Co Sdn Bhd* [1979] 1 MLJ 1 where it is held:

C A company may carry on business as an investment or holding company deriving its gains or profits from dividends and interest from the securities it owns. (at p 2 of Report).

(6) Sixth, again, there is authority in the Privy Council case of *Rangatira Ltd v Commissioners of Inland Revenue* [1997] STC 47 where Lord Nolan said:

D

The authorities ... contain a number of instances in which investment holding companies, no less than investment dealing companies, have been treated as carrying on a business for taxation purposes, and their Lordship feel no doubt about the correctness of such treatment.

E Thus, the learned Special Commissioners conclusions are against the Agreed Facts (item 1, p 3 of Case Stated) and are not supported by s 60F nor by s 33(1) of the Act which applies to all sources of income, and are not supported by the Privy Council authorities of *American Leaf Blending* (supra) and *Rangatira* (supra).

F **[65]** It is difficult to understand as to why the learned Special Commissioners wanted to follow two writers instead of the law as cited here. In fact, there are serious errors of law in the conclusion of the two writers viz:

a) Dr Chin Yoong Kheong, where he states:

G The severe restriction on the tax deductibility of expenses incurred by an investment holding company stems from the fact that its income is generally accorded the 'pure income' concept. From this pure income concept we infer that apart from a direct expenditure, the accrual of the investment income cannot in any way be affected by the quantum and nature of the expenditure incurred. (at p 26 of Case Stated).

H There is no provision in the Act to support the severe restriction! No authority is cited by the learned writer; and

b) Dr Veerinderjeet Singh states:

I As for deductible expenses, the normal rules apply for an investment dealing company is a business loss an if unabsorbed in the current year, it is carried forward to the subsequent year. However, for an investment holding company, a loss arising from excess of allowable expenditure over investment income is not a business loss and therefore can neither be deducted nor

carried forward. (At p 27 of Case Stated quoted with typographical errors without correction). A

[66] It is observed that the writer assumes that an investment holding company is not in business and therefore, the learned writer concludes a loss by an investment holding company 'can neither be deducted nor carried forward'. It is clear that the Privy Council cases of *American Leaf Blending* (supra) and *Rangatira* (supra) do not support his conclusion. And further, s 33 applies to all sources of income. B

[67] Ground Four of the Appeal evaluates the learned Special Commissioners' conclusion of law when they held as follows:

(1) upon examination of the facts, we find the use of the bank guarantee facility was: C

(a) an outgoing and an expense;

(b) wholly and exclusively;

(c) incurred during that period,

however, it was not incurred in the production of gross income of the Appellant. D

(2) Since the fourth element is not satisfied we find the payment for use of the bank guarantee facility is not an allowable deduction on under s 33(1) of the Act. (at p 30 Case Stated).

[68] There is a contradiction, perhaps not obvious, in the above statements as follows: E

If an expense is found to be capital as the learned Special Commissioners found in this case, how could it be wholly and exclusively 'incurred' within the meaning of s 33(1) of the Act when that section deals only with revenue expenditure? Therefore, the contradiction is plain. F

(a) The words 'an outgoing and an expense', 'wholly and exclusively' and 'incurred' cannot and should not be dissected but read as a whole in relation to the words 'in the production of income'. Thus read, the words 'an outgoing and an expense', 'wholly and exclusively' and 'incurred' must refer to revenue expenditure and not to 'capital expenditure'. G

(b) The logical statement to make in relation to s 33 is that an item of expenditure may be revenue in nature but may not be incurred wholly and exclusively in the production of income. Such an example is found in the case of *Ampat Tin Dredging Ltd v Director General of Inland Revenue* [1982] 2 MLJ 46, where retrenchment benefits expenditure incurred upon closure of a tin mine was considered. There it was held to be not deductible because, though it was revenue expenditure, it was not wholly and exclusively incurred: H

It must be wholly and exclusively incurred in the production of income. In the present case, for work done, all the company's employees were paid salaries or wages for which deduction had been allowed. At the most the retrenchment benefits can only be said to be related to the production of income but not exclusively in the production of income. I

[71] The Appellant is found as a fact to be in the business of carrying on an investment company. This is in the 'Statement Agreed Facts' and the learned Special Commissioners cannot go behind the agreed facts (see *Chua Lip Kong* (supra)). Thus, the learned Special Commissioners' conclusion that the dividends ought to be under s 4(c) of the Act and not as business income under s 4(a) is an error of law as the conclusion is against the Privy Council authorities in *American Leaf Blending* (supra) and *Rangatira* (supra), and against the fact that the Appellant is in the business of an investment holding company. Dividend income accrued from the purchase of the shares and warrants and it follows that the operating cost of producing the income should be allowed. As was said in the Court of Appeal case of *ML & Ors* (supra), interest on loans is tax deductible. Bank Commission is analogous to interest and falls within the meaning of 'wholly and exclusively incurred in the production of income'. At any rate, the bank commission cannot be described as capital since it is recurring expenditure and does not add to the cost of the shares and warrants but to the cost of earning the dividend income. Further, it cannot be said that the bank commissions were for the purchase price paid in instalments over a period of time. There is no evidence to support such a conclusion. The case of *Scoble* (supra) clearly establishes the conditions under which a purchase price that is paid in instalments over a period of time is capital. In this case, there are no such circumstances. It is also an agreed fact that the bank commission fees are for use of the Bank Guarantee, not to create it.

[72] For these reasons the appeal is allowed with costs.

Appeal allowed.

Reported by Lim Lee Na

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[69] In that case, the purpose of the retrenchment benefits was also to close the tin mine and therefore, the expenditure was a dual purpose expenditure, and did not qualify for deduction. I think this fourth ground of Appeal is not so vital to the appeal and I am of the opinion that Grounds One to Three of this appeal are sufficient to dispose of the appeal in favour of the Appellant.

[70] An appeal can only be taken upon points of law. 'The question of what is capital and what is revenue is a question of law for the Courts.' (Lord Denning in *Heather v PE Consulting Group Ltd* 48 TC 293). Thus, this appeal is correctly taken. The role of an appellate court in respect of a case stated is well defined. If the case stated contains anything, which ex facie is bad in law and bears upon the determination of the case, it is erroneous in point of law and the appellate court must intervene. Even if there is no such misconception appearing ex facie, if the finding is such that a person, acting judicially and properly instructed as to the law applicable, could not reasonably have arrived at such a determination, the appellate court is duty bound to intervene. The appellate court has no option but to assume that there has been some misconception of the law resulting in such a determination. It does not matter whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory to the determination, or even as one in which the true and only reasonable conclusion contradicts the determination' (see *Edwards v Bairstow & Harrison* 36 TC 207, [1956] AC 14). I am of the opinion that I am correct to use the test in the Court of Appeal case of *ML & Ors* (supra) namely, did the bank commission fees create an asset or an intangible asset for the Appellant or were the bank commission fees an operating cost in producing the dividend income in the course of carrying on the business of an investment company? It is my finding that the following facts indicate that the bank commission fees did not add up to capital or create an asset:

(i) The bank guarantee was created by virtue of the Memorandum of Deposit and Mortgage under which the shares and warrants were pledged as collateral security. This created the asset, namely the bank guarantee.

(ii) There was an initial fee paid, namely an 'arrangement fee' of RM2,478,561 and this fact was ignored by the learned Special Commissioners. This fact indicates that the 'arrangement fee' was preparatory to the Bank Guarantee and thus, the bank commission was in fact for the banking service, and the arrangement fee, together with the shares and warrants as collateral, created the asset, namely the bank guarantee.

(iii) The bank commissions were of a recurring expenditure paid at 1.5% per annum and for a short duration and these factors clearly indicate, in the absence of other opposite circumstances, the expenditure to be of a revenue nature.